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No. _____

Supreme Court, U.S.
FILED

MAR 11 1987

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

— o —
JAMES M. SAYLOR,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

— o —
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

— o —
PATRICK W. HEALEY
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QUESTIONS PRESENTED FOR REVIEW

1. Were petitioner's rights under Amendments V or VI, or both, violated by interrogation by agents of the police continued after petitioner had repeatedly asserted his right not to be interrogated and his right to have counsel available before interrogation, and after the police had repeatedly prevented contact with counsel and disregarded requests for counsel.

2. Was petitioner deprived of his liberty in a significant way and entitled not to be interrogated by police agents without counsel when the undisputed evidence shows:

- A. Petitioner had been held against his will for 8 hours or longer.
- B. Petitioner had requested counsel on numerous occasions but police continued to pursue attempts at interrogation and without providing counsel, and prevented him from contacting counsel.
- C. Petitioner had been told he was under arrest.
- D. By police arrangement, petitioner was placed in the company of persons he did not choose to be with, who were police agents instructed to carry on further interrogation.
- E. Petitioner was taken by compulsion to his parents' home although he expressly stated he did not wish to go there, and specifically requested to be taken elsewhere or permitted to leave the police vehicle.

- F. The location where petitioner was taken was, by prearrangement, surrounded by police instructed to follow him wherever he went.
- G. Police had already made arrangements for a search warrant while petitioner was being held against his will and refused contact with counsel.
- H. Law enforcement authorities were prepared to and did arrest petitioner as soon as the police agents left.
- I. Petitioner was first allowed to talk to counsel the following morning, some 20 hours after he had requested the right to counsel and the right to have no questioning without counsel.

PARTIES TO THE PROCEEDING

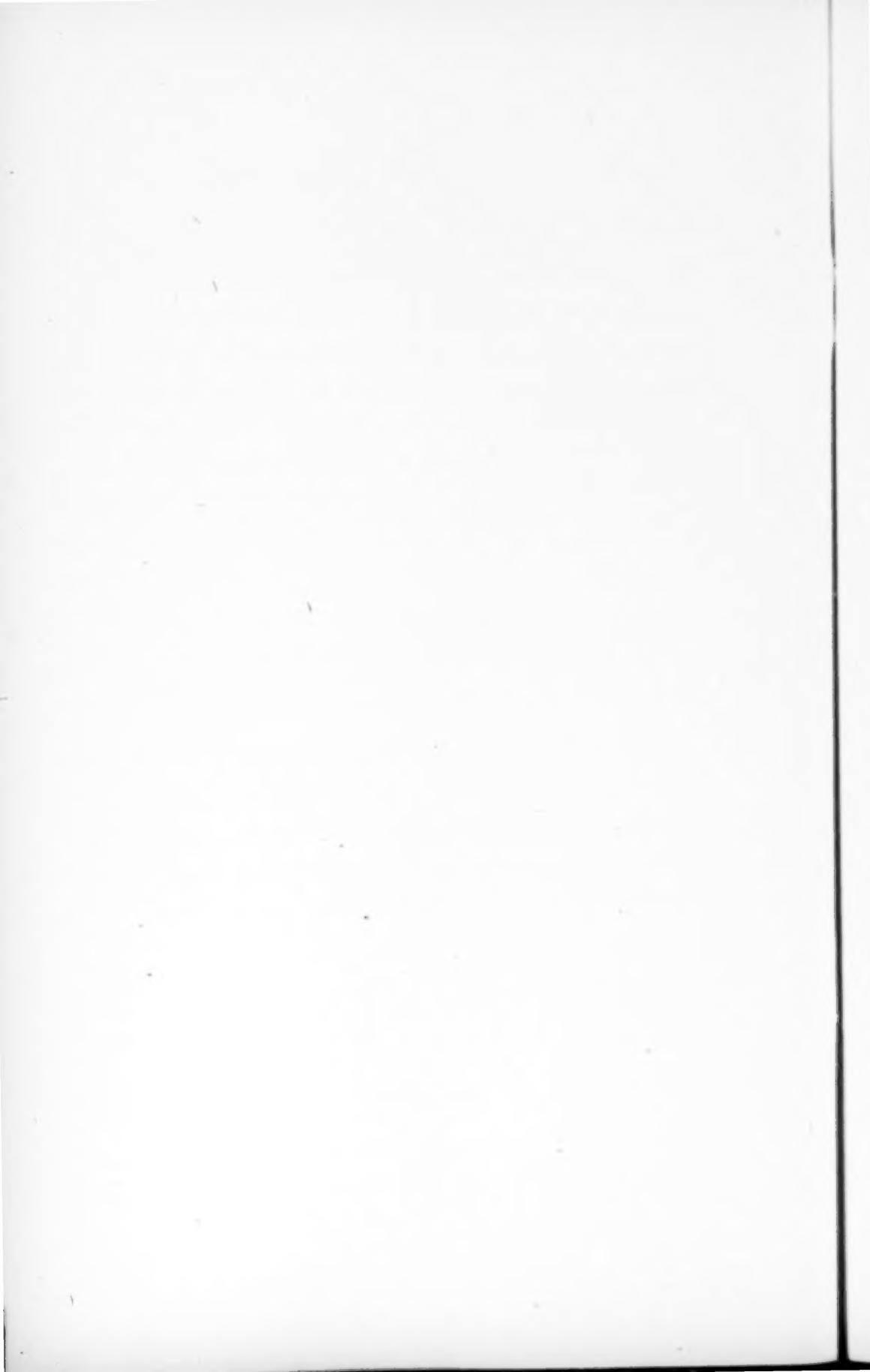
The sole parties to the proceeding are Petitioner and
The State of Nebraska, as shown in the caption.

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OPINION OF THE COURT BELOW

The opinion in the Nebraska Supreme Court appears as *State v. James M. Saylor*, (No. 85-724), 223 Neb. 694, 392 N.W.2d 787 (1986). See Appendix.

JURISDICTION

The judgment of the Supreme Court of Nebraska sought to be reviewed was entered by the issuance of its opinion on August 29, 1986. See Appendix "A".

Motion for Rehearing was timely filed on September 5, 1986. Order was entered on January 14, 1987 overruling motion of appellant for rehearing. See Appendix "B".

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private prop-

erty be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution, § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

On the morning of Saturday, April 28, 1984 (the day after his grandmother was found dead in her home) petitioner James M. Saylor received a message that a Lincoln, Nebraska police detective wished him to come to headquarters to furnish fingerprints (53:4-55:18). Having no objection to furnishing fingerprints, Saylor arrived at the

police station over the noon hour (38:13-15;55:9-15). He was fingerprinted, but also given Miranda warnings and questioned by a detective for 35 to 40 minutes (38:18-40:18). About 1:40 p.m. he requested that his attorney be notified and be present before questioning proceeded further. Disregarding that request and refusing his requests to use a phone, the police placed petitioner in a holding cell where he remained until about 8:00 p.m. (40:2-41:22; 45:17-47:19). He was told he was under arrest but was shown no charges. He asked repeatedly for an opportunity to call his own attorney or to have an attorney made available but his attorney was never contacted (41:2-18;48:12-51:4). The police pursued repeated attempts to question him and disregarded repeated requests to contact his attorney (63:12-73:6).

While holding Saylor in custody, police and prosecutors made a plan to trick Saylor into making incriminating statements (43:21-46:6). The police plan involved continuing questioning of petitioner through two "friends" who were induced to serve as police agents with concealed microphones and transmitters, which would broadcast any conversation to police officers in a cruiser parked nearby (102:23-103:13;106:13-19). While continuing to prevent petitioner from contacting counsel, police persuaded the two friends to go to Saylor's parents' residence (where he also resided) where the police would bring him, and then to interrogate him without counsel on the subject he had refused to discuss without presence of counsel. The police told the friends what to say to get him to discuss the subject and suggested that the friends make certain statements, some false, to induce Saylor to discuss the subject (102:23-103:13;106:13-19).

About 8:00 p.m. detectives took Saylor from the police station to his parents' home (76:21-23) after having already arranged for the two "friends" to be at that location. Saylor did not wish to go there and requested that he be taken to his girl friend's house or to be dropped off elsewhere, but his request was rejected (77:1-78:9).

After Saylor arrived at his parents' residence, he was asked by the two police agents to go down to his bedroom so conversation would not be heard by Saylor's mother or step-father, and they engaged him in a conversation concerning his grandmother's death by telling him that the police had forced them to take polygraph tests. The polygraph test statement was untrue and had been suggested to the two friends by the police (10:16-17). The two friends remained with Saylor for about two hours. The police recorded the conversation during which Saylor made incriminating statements (E 6 150; 152). All the while numerous police cruisers and officers were waiting for the conversation to end; followed Saylor and the "friends" when they made a trip to the liquor store, and took Saylor into custody as soon as the "friends" left.

Charged with murder, Saylor moved for suppression of the tape because of violation of rights under Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and Nebraska Constitutional provisions (E 7:152;T4). The Motion to Suppress was denied after evidentiary hearing (111-162). Saylor was tried by the Court on an amended charge of second degree murder; at the trial the Motion to Suppress was renewed on the hearing record and the tape recording was received in evidence over objection as a major portion of the State's

evidence purporting to connect Saylor with the death of his grandmother (152:25).

Saylor appealed to the Supreme Court of Nebraska. The Assignments of Error in that appeal were:

-1. The District Court erred in denying Saylor's Motion to Suppress the recordings of his conversation with Menard and Timm, because the tape recordings were made in violation of his right against self-incrimination and the right to effective assistance of counsel.

2. The District Court erred in receiving the recordings in evidence over defendant's objection and in rendering judgment and sentence on the basis thereof.

The Nebraska Supreme Court in its opinion (see Appendix A) agreed that the two friends "were police agents who deliberately elicited incriminating responses from the defendant" after ignoring Saylor's request for interrogation to cease and for an opportunity to consult with counsel before questioning, but concluded that the interrogation was not "custodial" at the time the recording was made and that Saylor's right to counsel had not attached so that the state was not foreclosed from secretly and deliberately interrogating the defendant in the absence of counsel.

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REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the decision of the Nebraska Supreme Court decides an important Federal question in a way in conflict with applicable decisions of this Court, and permits and encourages

law enforcement authorities to disregard and dishonor clearly established rights to consult with counsel before questioning and to have no interrogation in the absence of counsel when such right has been asserted.

The question is clearly presented by the record and is ripe for review. In the State trial court petitioner's Motion to Suppress was the subject of an evidentiary hearing with substantial testimony. On petitioner's trial to the Court the Motion to Suppress was renewed and the record of the evidentiary hearing on that motion was made a part of the record. Neither the State nor the Courts have doubted that the statements obtained from petitioner were damaging and not harmless.

This Court in *Miranda v. Arizona*, 384 U.S. 436 (1966) and many other cases have made it clear that all interrogation must stop when a suspect asserts the right to counsel or the right not to be questioned without counsel present, and interrogation may not be resumed until counsel is present or there is a valid waiver.

This Court made it explicit that custodial interrogation must cease when the right to counsel or the right to remain silent is invoked and that such request for counsel must be scrupulously honored before questioning may continue. In *Miranda* this Court said:

If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

Id. at 444-445.

The Court reasserted this rule in *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, a suspect and his attor-

ney were kept physically separated by the police until custodial interrogation of the suspect had been completed.

[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-485.

In this case the right to counsel was simply disregarded and the evidence is undisputed that the police held Saylor for several more hours, continued to try to question him without counsel, and refused him use of a telephone or access to counsel. During that time they laid elaborate plans, obtained a search warrant, and made arrangements for the two "friends" as police agents to continue the process of interrogation to induce petitioner to discuss the very subject he had refused to discuss without counsel.

In *United States v. Henry*, 447 U.S. 264 (1980) this Court found a violation of rights when a prisoner made statements as a result of questioning by a government informant within the jail where he was held.

In *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477 (1985) defendant was questioned by a co-defendant, wearing a body transmitter. The co-defendant was a police agent who had agreed to cooperate with the police. Holding that the right not to be interrogated without counsel must be scrupulously respected this Court said:

The police thus knew that Moulton would make statements that he had a constitutional right not make to their agent prior to consulting with counsel. * * * By

concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.

The opinion and decision of the Nebraska Supreme Court are flawed by a misreading of *Moran v. Burbine*, — U.S. —, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). All that case really decided was that no one other than the defendant can invoke the right to counsel on defendant's behalf. Although the Court in *Moran* suggested that the decision in *Miranda* was grounded on the Fifth Amendment rather than the Sixth Amendment, it is wrong to conclude from that that right of counsel has no meaning before charges are filed, *in relation to the process of interrogation*.

Petitioner would certainly agree that the general right to counsel (for advice in general, witness contact, trial preparation and the like) may not attach until formal charges are filed. But *Miranda* made it abundantly clear that the right to counsel in relation to the *process of questioning* was essential to make the Fifth Amendment effective. If the right to counsel during questioning is to be of any value the right must not be dismissed and disregarded but must be scrupulously respected by the Court. That was clearly stated as recently as *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477 (1985) where the Court explicitly stated that the prosecutor and police have affirmative obligations not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Certainly the Court does not suggest that it is meaningless ritual for defendant to be advised in the *Miranda* warnings that he has a right to counsel before any ques-

tioning occurs. Although the right to counsel may not exist for all purposes prior to filing of charges, it is plainly a prerequisite to continue police interrogation after the right has been asserted.

While petitioner would agree that there is a "bright line" requiring the right to counsel to be fully respected after formal charges have been filed, that cannot mean that an opportunity to consult with counsel in regard to the process of interrogation has no meaning. It would be a mockery of *Miranda* to hold that an accused person must be advised of the right to have counsel present before questioning and to have no interrogation without counsel present, but then to say that that right is illusory and need not be scrupulously respected.

Under the undisputed facts shown in this record, the process of interrogation through police domination of Saylor's whereabouts continued at the time the incriminating statements were induced. The State through the police authorities controlled where Saylor was; who he was with; what was said to him; and what subjects were discussed. Meanwhile the police waited in numbers a short distance from petitioner's location, armed with a search warrant and fully intending to take Saylor back to jail once he had responded to the police-induced interrogation.

The decision in this case misreads clear requirements imposed by the Federal Constitution and sanctions a blatant disregard of the right of an interrogated person not to have interrogation continued without counsel when such right is invoked. For hours the police disregarded their duty to permit petitioner to contact counsel before questioning occurred, and continued the process of inter-

rogation while preventing access to counsel. The results cannot be allowed to stand in the face of the Constitution of the United States.

Respectfully submitted,

JAMES M. SAYLOR, Petitioner

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,

v.

James M. Saylor, Appellant.

Case Caption

State v. Saylor

Filed August 29, 1986. No. 85-724.

Appeal from the District Court for Lancaster County:
William D. Blue, Judge. Affirmed.

Patrick W. Healey and Susan Jacobs, for appellant.

Robert M. Spire, Attorney General, and Lynne R.
Fritz, for appellee.

STATE V. SAYLOR

NO. 85-724—filed August 29, 1986.

1. Confessions: Right to Counsel. If a defendant indicates during the course of custodial interrogation the desire to consult with an attorney before answering any questions, interrogation must cease until an attorney is present.
2. Criminal Law: Arrests. The ultimate inquiry regarding the custodial status of a suspect is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

3. Criminal Law: Police Officers and Sheriffs: Arrests. A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

4. Constitutional Law: Right to Counsel: Confessions. Once the sixth amendment right to counsel has attached, the State must honor that right and may not secretly and deliberately interrogate the defendant in the absence of counsel.

5. Constitutional Law: Right to Counsel: A person's 6th and 14th amendments right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

6. —: —. The right to counsel attaches at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

7. —: —. The sixth amendment right to counsel does not attach until after the initiation of formal charges.

8. —: —. The purpose of the sixth amendment is to assure in any criminal prosecution that the accused shall not be left to his own devices in facing the prosecutorial forces of organized society.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

BOSLAUGH, J.

The defendant, James M. Saylor, was convicted of second degree murder and sentenced to life imprisonment.

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He has appealed and has assigned as error the overruling of his motion to suppress statements made by him to Jeffrey Menard and David Timm.

The defendant's grandmother, Lena C. Saylor, was found dead in her home in Lincoln, Nebraska, on April 27, 1984. A neighbor had observed a white male in his late teens or early twenties running from Mrs. Saylor's home at about 5:30 a.m. that morning. The police were called shortly thereafter. The parties stipulated that the pathologist who performed the autopsy on Lena Saylor's body would testify with a reasonable degree of medical certainty at trial that the cause of her death was respiratory arrest, and while Mrs. Saylor could have died of natural causes, the cause of the respiratory arrest was most probably smothering.

Following Lena Saylor's death, Jeffrey Menard and David Timm, friends and associates of the appellant, notified police authorities about conversations between the appellant and themselves in which the defendant had indicated that he was thinking about killing his grandmother so that he could receive an expected inheritance.

On Saturday, April 28, 1984, Detective Sorensen of the Lincoln Police Department asked the defendant to come to the police station to be fingerprinted. The defendant arranged to meet Sorensen that afternoon and voluntarily went to the station at about 12:35 or 12:40 p.m. The defendant was then fingerprinted but not released. The defendant was taken to the chief of police's office, where he signed a *Miranda* warning and waiver form at 1:05 p.m. and was then questioned. Within a short period of time the detective's questions became accusatory. At that point,

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approximately 1:35 to 1:40 p.m., the defendant stated that he did not wish to be questioned further unless an attorney was present. The defendant was then placed in a holding cell but was not permitted to contact an attorney. He was kept in police custody at the station until 8 or 8:30 that evening.

During the time at the police station, the defendant estimated that he requested counsel on 15 to 20 occasions but was never given the opportunity to call a lawyer. He testified at the suppression hearing that each time he requested the assistance of counsel, Detective Sorensen would attempt to reengage him in discussions about Lena Saylor's death, despite the fact that he had not been given the opportunity to contact counsel. He also testified that Detective Peschong informed him that he was under arrest. There is no evidence that the defendant made any incriminating statements regarding his grandmother's death while in custody at the police station between 12:35 and 8:30 p.m.

Sometime after 8 that evening, two police detectives drove the appellant to his parent's home. During this trip, the defendant asked to be taken to his girlfriend's home. The detectives refused to do so. One of the detectives told the defendant that he would not be taken there because his driving privileges had been suspended and the detective did not want the defendant to drive the truck he had left at her home.

When the defendant arrived at his parents' house, he found Menard and Timm in the kitchen talking with his mother.

Following their conversations with the police concerning Saylor's prior statements about killing his grand-

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mother, Menard and Timm had agreed to go to Saylor's home and attempt to engage him in conversation about Lena Saylor's death. Menard agreed to wear a microphone and transmitter capable of picking up any conversation between the three men. Although reluctant at first, Menard and Timm agreed to take the wire in and engage the defendant in conversation because the police had informed them that Saylor had accused them of somehow being involved in the death.

Before entering the home, Menard and Timm were instructed by the police on how to achieve the best transmission to a receiver located in a nearby patrol car. The police also suggested ways of initiating conversation about the death, such as telling the defendant they had been required to submit to a polygraph examination and that they had informed the police of the defendant's prior statements.

Sometime after the defendant's arrival at the house, it was suggested that the three men go for beer. Upon their return they went to the defendant's basement bedroom, where they drank beer, listened to music, and engaged in conversation. Menard and Timm stayed with the defendant for 1 to 2 hours, and during this time, incriminating statements made by the defendant were transmitted to and recorded by the police. In one of the statements, the defendant indicated that he had hired someone to kill his grandmother. The defendant was arrested 10 to 15 minutes after Menard and Timm left the Saylor home. He was permitted to meet with an attorney for the first time the next morning.

The defendant was originally charged with first degree murder. On December 7, 1984, he filed a motion to

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suppress all statements made by him to Menard and Timm on April 28, 1984, and all recordings of any such statements. The motion alleged that the statements had been obtained in violation of the defendant's privilege against self-incrimination and his right to counsel as guaranteed by the 5th, 6th, and 14th amendments to the U.S. Constitution and by article I, §§ 3 and 12, of the Nebraska Constitution. The motion also alleged that the statements had been obtained in violation of the defendant's right to privacy. The motion was denied on April 2, 1985.

The information was amended to charge second degree murder, when the defendant agreed to a bench trial. At the trial, tape recordings of the April 28 statements were received in evidence over objection.

The defendant contends that the trial court erred in (1) denying his motion to suppress, because the recordings of the conversations with Menard and Timm were obtained in violation of his right against compelled self-incrimination and his right to effective assistance of counsel, and in (2) receiving the recordings in evidence over objection and in rendering judgment and sentence based thereon.

With regard to the contention that the recorded statements were obtained in violation of Saylor's 5th and 14th amendment rights against compelled self-incrimination, the 5th amendment in pertinent part provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court held that "the prosecution may not use statements, whether ex-

culpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

Certain procedural safeguards were then set out by the *Miranda* Court, including the now familiar *Miranda* warnings. Included as a safeguard was the rule that if a defendant indicates during the course of custodial interrogation the desire to consult with an attorney before answering any questions, interrogation must cease until an attorney is present. This view was reaffirmed in *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981): "[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." See, also, *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984). If Saylor had made incriminating statements after invoking his right to counsel, while in custody at the police station, it appears that the statements would have been inadmissible.

The *Miranda* requirements and safeguards, however, do not apply outside the context of the inherently coercive custodial interrogations for which they were designed. *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

According to the *Miranda* Court, custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any signifi-

cant way.” *Miranda*, *supra* at 444. Later, in *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), the Court emphasized that custody for *Miranda* purposes requires restriction of one’s freedom of movement, because that is the type of coercive environment to which the *Miranda* safeguards were directed. See, also, *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983).

More recently, the Court has determined that the ultimate inquiry regarding the custodial status of a suspect “is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). See, also, *Minnesota v. Murphy*, *supra*.

In the present case the trial court determined that the statements in question were neither compelled nor made while Saylor was in custody. At the outset we note that in reviewing the trial court’s factual determinations on a motion to suppress, we will not overturn those findings unless they are clearly wrong. *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

Although Menard and Timm were police agents who deliberately elicited incriminating responses from the defendant, the trial court was not clearly wrong in finding that the statements were noncustodial.

The defendant contends that the circumstances surrounding his conversation with Menard and Timm transformed the setting into a custodial one. In support of this notion, he points to evidence that the detectives refused to drive him anywhere but home, that the detectives did not leave, after dropping him off, until some time after he

could no longer see them, that he was flanked by two police agents at all times, and that there was heavy police surveillance in the area. The defendant was unaware that Menard and Timm were acting as police agents. The defendant testified at the suppression hearing that while he thought he might "possibly" be under surveillance when he was dropped off at home, he did not consider himself under arrest at the time of the discussion with Menard and Timm. While he testified that he did not know if he was free to come and go as he pleased during that time, he conceded that he was able to leave the house with Menard and Timm to get beer, without police interference.

Recently, in *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), Justice Marshall wrote: "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."

Aside from the fact that the detectives would not take the defendant to his girlfriend's house nor drop him off at a street corner near his home, there is no evidence that he was not free to leave or that his freedom of movement was restricted to a degree associated with arrest, after he had been released at home. In fact, the defendant did not think that he was under arrest. While he testified that he was not sure if he was then free to come and go, the record shows that he, Menard and Timm freely left the house to obtain beer. He also testified that his statements to Menard and Timm were freely and voluntarily made.

He did not ask Menard and Timm to leave nor make any effort to avoid engaging in conversation with them. The evidence clearly shows that Saylor was not in custody when the incriminating statements were made.

The circumstances in this case are not analogous to those in *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). In that case the U.S. Supreme Court held that the defendant's fifth amendment rights had been violated because he had been interrogated in his bedroom at 4 o'clock in the morning by four police officers, without the benefit of *Miranda* warnings. One of the officers in *Orozco* testified that the defendant was under arrest and not free to leave while being questioned.

Because we find that the trial court's determination that Saylor's statements were made in a noncustodial setting was not clearly wrong, we conclude that the appellant's fifth amendment rights, as delineated in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1682, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), were not violated by the police in this case. Instead, this case is more analogous to the situation presented in *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), where the U.S. Supreme Court refused to suppress, on fifth amendment grounds, incriminating statements to an undercover agent. The defendant attempts to distinguish *Hoffa* on the basis that the defendant there had not yet invoked his right to counsel. This argument ignores the fact that Saylor's statements were not made in custody where the *Miranda* and *Edwards* safeguards were intended to apply.

With regard to whether the defendant's sixth amendment rights were violated, once the sixth amendment rights

were violated, once the sixth amendment right to counsel has attached, the State must honor that right and may not secretly and deliberately interrogate the defendant in the absence of counsel. See, *Maine v. Moulton*, — U.S. —, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Mas-siah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

Relying on *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the defendant argues that his sixth amendment right to counsel had attached prior to his conversation with Menard and Timm because, given the adversarial and accusatory nature of the interrogation at the police station, for all practical purposes he had been charged. The fact is he had not been formally charged at that point.

In *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the U.S. Supreme Court stated that “it has been firmly established that a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.” The Court also recognized that, except for *Escobedo*, all of its cases had indicated that the right attaches “at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Kirby, supra* at 689. *Escobedo* was said to be inapposite as to this issue because its primary purpose was not to vindicate the right to counsel as such but to guarantee the fifth amendment right against self-incrimination. It was also noted in *Kirby* that the

holding of *Escobedo* has been limited to its own facts, in *Johnson v. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966).

Recently, in *Moran v. Burbine*, — U.S. —, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), the U.S. Supreme Court addressed the issue of when the sixth amendment right to counsel attaches regarding a suspect who was in custody, received the *Miranda* warnings, signed three valid waivers, and made incriminating statements. The facts in *Moran* indicate that the respondent's sister had contacted an attorney for him after he was in custody. The attorney, upon speaking with the detention authorities and informing them that she would act as respondent's counsel, was told that the respondent would not be interrogated any further that evening. In fact, the respondent was interrogated within an hour following the attorney's call. The respondent was never informed of the attorney's call, nor did he request an attorney after waiving that right.

On appeal Burbine's counsel, relying on *Escobedo*, argued inter alia that the sixth amendment required exclusion of his confessions. The Court recognized the difficulty with this argument, in that the interrogation sessions took place before Burbine had been charged.

In resolving this issue the Court, citing to *Kirby*, stated that "subsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings." *Moran*, *supra* at 1145.

The Court ultimately concluded that "the Sixth Amendment right to counsel does not attach until after the

initiation of formal charges.” *Moran, supra* at 1146. In support of this conclusion the Court stated that the purpose of the sixth amendment is to assure in any criminal prosecution that “the accused shall not be left to his own devices in facing the “ ‘prosecutorial forces of organized society.’ ” ” *Moran, supra* at 1146. The Court also cited *Maine v. Moulton*, — U.S. —, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), as support. In *Moulton* the Court concluded that evidence obtained surreptitiously as to two crimes must be suppressed regarding the crime for which the defendant had been indicted, at the time of his statements, but not as to the crime for which there was no indictment. In the *Moran* Court’s view, its holding that the sixth amendment did not attach until formal charges were initiated was clearly implied by the *Moulton* result.

In the present case the defendant’s sixth amendment argument fails because he had not been formally charged at the time he made his inculpatory statements. “[T]he initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel.” *Moran, supra* at 1146.

Nebraska’s constitutional counterparts to the fifth and sixth amendments do not require a different result. Neb. Const. art. I, §§ 3, 11, and 12.

There being no error in the ruling on the motion to suppress, the defendant’s statements to Menard and Timm were admissible and were properly considered by the trial court in rendering its judgment.

The judgment is affirmed.

AFFIRMED.

App. 14

APPENDIX B

**IN THE SUPREME COURT
OF THE UNITED STATES**

STATE OF NEBRASKA)

Appellee,)

vs.)

NO.

JAMES M. SAYLOR,)

Appellant.)

1-14-7 Motion of appellant for rehearing overruled.

